PANG AH CHEE (M.W.)

v.

CHONG KWEE SANG

FEDERAL COURT, JOHOR BAHRU
SALLEH ABAS LP
WAN SULEIMAN FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 326 OF 1983]
4 OCTOBER 1984

DAMAGES: *Quantum - General damages - Number of years purchase - Prospect of marriage - Whether relevant factor - Loss of dependency - Special damages - Funeral expenses and cost of repair of motor-cycle - Proof - Sections 56 and 57, Evidence Act - Effect.*

APPEAL: *Revision of award of damages - Powers of appellate Court.*

EVIDENCE: *Special damages - Burden of proof - Sections 56 and 57, Evidence Act - Effect.*

The appeal was against the decision of the High Court in respect of awards of general and special damages. The High Court had revised the awards made by the President of the Sessions Court, Johor Bahru. The action was commenced by the mother of the deceased who died in a motor accident.

Held:

[1] The appeal against the decision of the appellate Judge on the quantum of the number of years purchase must be dismissed. The award of the President was far too excessive reflecting a wholly erroneous estimate. The Judge was not speculating when he stated that the prospect of the deceased before his death of getting married was "so much on the cards". The prospect of marriage is always a relevant factor when assessing the damages to be awarded to parents for the death of an unmarried child who was contributing to their keep. Each case must depend on its particular facts but there is always a common factor, that of the child marrying and his contribution to his parents diminishing as a consequence of the marriage. *(Kandalla v. British Airways Board* [1980] 1 All ER 341; *Brennan v. Richard Johnson and Nephew Ltd.* [1952] CA 18; *Dolbey v. Goodwin* [1955] 1 WLR 553).

[2] The other items of the award must be restored. Well established principles must be exercised by Courts exercising appellate powers.

(a) ***Loss of dependency***

The appellate Judge was not correct in decreasing the sum awarded as value of dependency. Where a trial Judge erred in the "direction of being too generous", that does not by itself constitute a matter to be appealed from. An appellate Court can interfere with an assessment only if it is considered inordinately low or inordinately high. It is not enough that there is a balance of opinion or preference. *(Pahang Lin Siong Motor Co. Ltd. & Anor. v. Cheong Swee Khai & Anor.* [1962] 28 MLJ 29; *United Plywood & Sawmill Ltd. v. Lock Ngan Loi* [1970] 2 MLJ 237; *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor.* [1978] 1 MLJ 61; *Davies v. Powell Duffyrn Associated Collieries Ltd.* [1942] AC 601, 616-617).

(b) ***Repair of motor-cycle and funeral expenses***

The appellate Judge was not correct in disallowing the award made by the President. Special damages must be proved but on a balance of probabilities. Further, s. 57 of the Evidence Act was not exhaustive and the Court under s. 56 may take judicial notice of matters which are of common and general knowledge. The Court has to be guided by what is reasonable. *(Bonham-Carter v. Hyde Park Hotel Ltd* [1948] TLR 177, 178; *Lee Sau Kong v. Leow Cheng Chiang* [1961] 27 MLJ 17; *Rushton v. National Coal Board* [1953] 1 All ER 314; *Hart v Griffith-Jones* [1948] 2 All ER 729).

[Appeal dismissed.]

Cases referred to:
Kandalla v. British Airways Board [1980] 1 All ER 341
Brennan v. Richard Johnson and Nephew Ltd. [1952] CA 18
Dolbey v. Goodwin [1955] 1 WLR 553
Pahang Lin Siong Motor Co. Ltd. & Anor. v. Cheong Swee Khai & Anor [1962] 28 MLJ 29
United Plywood & Sawmill Ltd. v. Lock Ngan Loi [1970] 2 MLJ 237
Kek Kee Leng v. Teresa Bong Nguk Chin & Anor. [1978] 1 MLJ 61
Davies v. Powell Duffyrn Associated Collieries Ltd. [1942] AC 601
Bonham-Carter v. Hyde Park Hotel Ltd. [1948] TLR 177
Lee Sau Kong v. Leow Cheng Chiang [1961] 27 MLJ 17
Rushton v. National Coal Board [1953] All ER 314
Hart v. Griffith-Jones [1948] 2 All ER 729

Legislation referred to:
Evidence Act 1950, ss. 56, 57

Other source referred to:
The Quantum of Damages, Kemp & Kemp, Vol. 1, p. 237

For the appellant - Tan Hock Kim; M/s. Tan & Tan
For the respondent - Varughese; M/s. Varughese & Co.

JUDGMENT

Hashim Yeop Sani FJ:

We have disposed of this appeal but we feel that a short written judgment would be in order.

The appeal before the learned Judge was against the decision of the learned President of the Sessions Court, Johor Bahru in respect of the awards of general and special damages. Thus the appeal before the High Court and before us was an appeal against quantum only.

The action in the Sessions Court was commenced by the mother of the deceased who had died in a motor accident. In his written judgment [1984] 1 MLJ 377 the learned Judge sitting in appellate jurisdiction had set out the background of this appeal chronologically and for convenience we will simply reproduce the excerpts from his judgment as follows:

> 3. The Summons was served on 28 July 1979. The case was first mentioned on 16 August 1979. By the second mention date on 30 August 1979 no defence had been filed and an Order was made precluding the defendant from defending the action.
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> 4. Thereafter the case was fixed for hearing to assess the damages to be paid.
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> 5. However, the case was not proceeded with on 4 October 1979 because plaintiff had gone to Canada. It was adjourned to 7 February 1980. On that day Mr. Matthew Varughese appeared for the defendant.

6. The case was postponed to 28 February 1980 and thereafter there were 6 further postponements before the trial actually began on 6 November 1980, with Mr. Tan Hock Kim as plaintiff's Counsel.

7. In the interim, on or about 11 March 1980, plaintiff's solicitors made their first amendment to the Statement of Claim. The funeral expenses were increased from RM1,000 to RM2,545.25.

8. On 20 July 1980, a second amendment was made. This time the name of the deceased's father was struck out from the Statement of Claim as being one of the dependants for the purposes of the claim under s. 7 of the Civil Law Act 1956.

9. About this time it seems that solicitors representing the parties had some discussion about a proposed agreed bundle of documents which was to be used at the trial.

10. On 16 July 1980, plaintiff's solicitors Tan & Tan sent a letter to the defendant's solicitors Varughese & Co. A conversation was referred to on 15 July 1980 regarding an agreed bundle of documents handed to the defendant's solicitors on 26 June 1980 seeking the agreement of the defendant's solicitors for their inclusion in the agreed bundle. This letter was tendered in evidence in the Court below and marked Exhibit P9.

11. A reply was sent by the defendant's solicitors dated 23 July 1980. The letter stated:

> We have no objection to the inclusion of the documents mentioned in para. 2 of your letter of the 16th instant.
>
> But the letter also contained an offer to agree the funeral expenses at a sum stated. Most importantly the letter was marked "Without Prejudice".

12. The subsequent history of this matter quite clearly suggests that the parties did not put up an agreed bundle of documents nor was there any agreement as to the funeral expenses or for that matter any other damage, general or special claimed by the plaintiff.

13. So when the trial began on 6 November 1980 the entire question of the damages to which the plaintiff was entitled was wide open.

It will be noticed from the history of the case that the case should really have been a simple and straightforward one. In our view the case became unnecessarily protracted largely because there was insufficient cooperation between the lawyers involved and subsequently insufficient restrain on the part of the learned Judge in the exercise of appellate powers. Much scholarship had gone into the written judgment of the learned Judge and a very substantial part of the judgment was devoted to the modes of proving documents according to the best evidence rules. But in the assessment of damages in a case like this a simpler approach would also help.

Firstly on the question of the number of years purchase where we dismissed the appeal against the decision of the learned Judge to revise the award of the learned President. The learned President dealt with the issue (p. 113) as follows:

> The deceased was 33 years of age when he was killed in the motor accident. Barring unforeseen circumstances he should have another 22 years before reaching the retiring age of 55 years. He had no plan for marriage. The plaintiff was 51 years old at the time of his death and the normal expectation of life for a woman is 68 years old. Hence in this case the plaintiff who is in good health has a normal life expectancy of 17 years from the date of deceased's death.

We feel that the award of the learned President was far too excessive reflecting a wholly erroneous estimate. The learned appellate Judge dealt with the same question (p. 45) as follows:

93. As for the number of years purchase it is observed that the learned President took 17 years life expectancy and reduced this figure by a third for contingencies bringing the figure down to 11 years and 3 months.

94. This figure would have been unobjectionable if everything else was equal. But this deceased was a bachelor of 33, and to all accounts quite eligible. I hold therefore that the prospect of his getting married was so much on the cards that the very maximum allowance that one could have made for the continuation of support was 7 years and that is the figure I choose.

We agree with the learned Judge. Much argument was directed against the words "prospect of his getting married was so much on the cards" used by the learned Judge in his written judgment. We feel that these words are merely a manner of expression and do not reflect any danger of speculation. We are certain that what the learned Judge had in his mind when he used these words were the age of the deceased and the normal prospect of marriage. He was not merely speculating.

There were in fact more elements of speculation in *Kandalla v. British Airways Board* [1980] 1 All ER 341 where the exact income of the deceased was unknown and the deceased were not supporting their parents at the time of their death and that in respect of one of the deceased daughters there was only talk (which in any case was disputed) of a pending engagement at the time of the accident.

The prospect of marriage is always a relevant factor when assessing the damages to be awarded to parents for the death of an unmarried child who was contributing to their keep for on marriage the child would be likely to reduce or even discontinue the contribution. Each case must of course depend on its particular facts but there is always one factor common to such cases. That factor is the possibility or even probability that if the deceased had not died he would some day marry and in consequence his contribution to his parents would become much smaller or even diminish. Kemp & Kemp's *The Quantum of Damages*, Vol. 1 p. 237, referred to the two decisions of the Court of Appeal providing a useful guide as to the multiplier likely to be adopted in such cases. In *Brennan v. Richard Johnson and Nephew Ltd.* [1952] CA 18 the Court of Appeal increased the trial Judge's award. In *Dolbey v. Goodwin* [1955] 1 WLR 553 the Court of Appeal reduced the award. In both cases the deceased son was unmarried and in his twenties. In *Brennan's* case the Court of Appeal applied a multiplier of about 7½ and in *Dolbey's* case, 8½. The principal reason for applying a smaller multiplier in the case of a deceased son than in the case of a deceased spouse is of course because if the son had married there would be prior claims which would reduce or even diminish his contribution to his parents.

As regards the other items of the award where we restored the judgment of the learned President we feel that certain well established principles must be followed by Courts exercising appellate powers. The amount awarded for damages for loss of dependency was strenuously contested. The learned President arrived at a figure of RM100 per mensem as value of dependency. The learned Judge thought that he could not accept RM200 per mensem as claimed nor could he agree to RM100 per mensem as decided by the lower Court as it was he said a "little on the high side" and then varied the sum to RM75 per mensem. It has however long been settled that where a trial Judge has erred in the "direction of being too generous" that would not by itself constitute a matter to be appealed from (*Pahang Lin Siong Motor Co. Ltd. & Anor. v. Cheong Swee Khai & Anor.* [1962] 28 MLJ 29). In *United Plywood & Sawmill Ltd. v. Lock Ngan Loi* [1970] 2 MLJ 237 Gill FJ (as he then was) explained the principle clearly when he said:

> The general principle is that an appellate Court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the Court exclaim. "Good gracious, is that the sum which has been awarded - that sum must be altered", or if it is so much out of the line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.

In such assessment there is generally ample room for individual choice to arrive at a fair and reasonable figure and the appellate Court is always slow to reverse the trial Judge's decision on such assessment unless there are strong grounds for interference. The Federal Court in *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor.* [1978] 1 MLJ 61 following Lord Wright's judgment in *Davies v. Powell Duffyrn Associated Collieries Ltd.* [1942] AC 601, 616-617 again stressed that it is not enough that there is balance of opinion or preference.

> The scale must go down heavily against the figure attacked if the appellate Court is to interfere, whether on the ground of excess or insufficiency.

The two items (funeral expenses and repair of motor-cycle) on which there was much argument and in respect of which we also restored the awards of the learned President are special damages. True, special damages must be proved - see Judgment of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd.* [1948] TLR 177, 178, quoted in *Lee Sau Kong v. Leow Cheng Chiang* [1961] 27 MLJ 17. Being special damages they are therefore not really a case of "measuring the immeasurable" *Rushton v. National Coal Board* [1953] 1 All ER 314, but to what extent the Court in the first instance was satisfied that the claims have been proved on the balance of probabilities. It is clear from the record here that as regards the cost of repair of the motor-cycle the appellant had said in her evidence-in-chief that the deceased's motor-cycle was sent for repairs after the accident and tendered a receipt for the payment of the repairs although she was not the one who made the payment. True, in cross-examination she also said that she had not taken the motor-cycle for repair herself. There is no dispute that the damage to the motor-cycle was as a result of the accident and that the photographs of the damage are shown in the Photographs P4A, B and C. There is also sworn evidence that the motorcycle had been sent for repairs and certain payment had been made towards the repairs. These claims had been pleaded and particularised in the statement of claim. We do not therefore think that the learned appellate Judge was correct in disallowing the award of RM400 made by the learned President for this item.

As regards funeral expenses the learned appellate Judge also disallowed the claim mainly on the grounds that the funeral expenses had not been strictly proved. Here we feel that the case is in fact stronger for not interfering with the award of the learned President. Even during argument before us Counsel for the respondent conceded that some expenses had been incurred as funeral expenses. Counsel for the appellant referred to the exchange of letters at pp. 170 and 171 of the appeal record. In a "Without Prejudice" letter dated 23 July 1980 from solicitors of the respondent to solicitors of the appellant an offer was made to agree to funeral expenses at RM750. As in the case of the claim for repair of the motor-cycle referred to previously the appellant claimed in her evidence for funeral expenses incurred to the amount of RM2,545.25 and produced 14 receipts which later were disputed by the respondent. The learned president awarded RM2,000 for funeral expenses which he considered fair and reasonable obviously based partly on the oral testimony and partly using his own knowledge of Chinese funerals. The learned appellate Judge referred to ss. 56 and 57 of the Evidence Act 1950. He said that the Act had laid down what the Court can take judicial notice of and everything else must be proved. We think that s. 57 of the Evidence Act merely sets out matters which the Court must take judicial notice of and the list therein is not exhaustive

and the Court under s. 56 of the Act may also take judicial notice of matters which are of common and general knowledge. In arriving at a reasonable and fair amount of compensation to be awarded, it was not wrong for the learned President to take judicial notice of Chinese funeral expenses and the fact that such expenses are normally incurred and only the amount would vary according to the status of the deceased or such other matters which may be considered by the Court. One has to be guided by what is reasonable. Thus in *Hart v. Griffith-Jones* [1948] 2 All ER 729 Streatfield J allowed the cost of embalming but disallowed the cost of a monument over the grave of the deceased. The status or station in life of a deceased and other relevant matters may be considered in arriving at a fair and reasonable figure as funeral expenses.

At the conclusion of arguments before us we dismissed the appeal against the award of the learned appellate Judge reducing the number of years purchase from 17 years to 7 years but restored the remaining awards of the learned President which had been set aside by the learned Judge.

Also found at [1985] 2 CLJ 221